Supreme Court of the United States.

OCTOBER TERM, 1902.

MARIANO F. SENA,
APPELLANT,
v.
UNITED STATES OF AMERICA.
No. 40.

ADDITIONAL BRIEF FOR APPELLANT.

Since the preparation of the original brief for appellant, the condition of the record has been so materially altered that it seems advisable to make a short addition to the presentation of appellant's case, while the brief for the United States calls for something in the way of reply.

There have been added, by the appellees, to the record, under stipulation between the parties, certain documentary evidence which is described at page 9 of the brief for the government, and was filed here as an "Addition to Record" on December 1, 1902. The most important part of this evidence is the will of Salvador Leyba, of March 12, 1836, in which he declares who had been his wife, and who were his four children and heirs. In these particulars the will corroborates the oral evidence given

on behalf of plaintiff at the trial in the court below. This will also enumerates the property of the testator, and specifically declares that it sets forth that which he considers as his property. This was clearly the reason for putting it in evidence, as it fails to make any mention of the grant here in question. It will be remembered that this testator was the only son of the only son of the original grantee, and if he did not own the property in 1836, nothing descended to his grandchildren, from two of whom the plaintiff purchased.

There has also been added to the record by appellant, under like stipulation, a deed from the maker of the will above mentioned, to his son Juan Angel Leyba, dated August 9, 1834, conveying the rancho of the Coyote Spring, together with the grant in which the rancho was situated, which was given to the grantor's grandfather by the King of Spain on the 25th day of May, 1728. This was filed in this Court, as a further addition to record, on December 15, 1902. In this deed the boundaries of the grant are given as follows:

> On the north by lands of the Captain Sebastian de Vargas;
> on the east by the road which goes from the city of Santa Fé to the spring of San Marcos;
> on the west by lands of the old Pueblo of the Cienega;
> on the south the cuesta (slope) called the arroyo of Oregano.

It will be seen that these are substantially the same boundaries as are given in the grant of 1728, and in the will of 1783, which are set out on page 9 of appellant's original brief. This fully meets the intended effect of the

will of 1836. No question is made as to the authenticity of this documentary evidence on either side. The deed to Juan Angel Leyba was not found until after the will of his father had been discovered by the representatives of the government, and it was then found in the old Spanish and Mexican archives preserved at Santa Fé in a disorderly and confused condition.

In appellant's original brief at pages 23–4, we gave a summary of plaintiff's case as it then stood. With the changed condition of the record, the appellant's case is so strengthened that we here reproduce that summary with interpolations and additions justified by the new matter in the record:

Plaintiff has a grant made in 1728;
he has possession delivered to the grantee in 1728;
he has the presumption that that possession continues, which presumption must prevail unless overcome by evidence;
he has the fact that such possession actually continued until 1783, when Simon, the son of the grantee, was dying on the land, at the Coyote Spring, as is distinctly declared by Simon's will;
he has the presumption that the possession existing in 1783 continued, which presumption must prevail unless overcome by evidence;
he has the fact that such possession did continue until 1834, when Salvador Antonio, declared by the will of Simon to be his only son, conveyed the grant to his son, Juan Angel Leyba;
he has the presumption that possession by Juan Angel accompanied his ownership, and that it continued, which presumption must prevail unless overcome by evidence;

he has the facts that Juan Angel was thereafter in possession at a date not fixed, but between 1839 and 1846, and that he was killed by Indians not far away from the Coyote Spring;

he has a deed from the only child, a son, of Juan Angel Leyba, who was a mere infant when his father was killed;

he has established the location and boundaries of the land;

he has the fact of ruins of houses at the Coyote Spring at the place where Simon made his will in 1783 and where Juan Angel lived up to the time of his death after 1839.

As shown in appellant's original brief, at pages 11 to 13, if anything has occurred to divest this Leyba title, the burden of proof is on the government to show it; and to this end the government has produced only the negative evidence of witnesses who merely say that they have not heard or known of the grant or of the Leybas. The strength of this is at once apparent by reference to the celebrated pig-stealing case where the defendant was triumphantly acquitted upon the evidence of ten witnesses who had not seen him steal the pig while there were but two who had seen the offense committed. And the court is urged by counsel for the government, upon such a showing, to hold that the clearly proved possession and assertion of ownership continued for more than 110 years, are not sufficient to justify a confirmation of the claim.

It is to be observed that one effect of these additions to the record has been to force counsel for the government to abandon the theory upon which they tried the case in

the court below. At that time they proceeded with the belief that the plaintiff and his witnesses had manufactured a family and genealogy of the Leybas to fit the grant, and were sturdy and wilful liars, and that the grant was of a small piece of land close to the city of Santa Fé—a most fantastic idea, creditable only to the imagination of its author. Both of these conceptions are destroyed by the later-discovered documents. The will of Simon de Leyba, of 1783, the will of Salvador Antonio Leyba, of 1836, the deed of his children, twelve days later, to José A. Romero, the will of Maria Josefa Leyba, of 1860, the deed of Ramirez and wife, of 1864, in every detail corroborate the oral evidence on the trial as to the Leyba pedigree, and is convincing that the witnesses were striving to tell nothing but the truth. And yet counsel for the government cannot refrain from attacking plaintiff and his witnesses (*Brief, pp.* 30–1, 47) upon grounds which are no longer tenable.

The will of 1783 and the deed of 1834 utterly destroy the fiction as to the location of the grant near the city of Santa Fé, showing as they do, that the grant includes the Coyote Spring and buildings near it. They also corroborate the evidence of Willison and Campos as to the existence of the ruins at that place, and discredit the government witnesses who said there were no such ruins.

REPLY BRIEF FOR APPELLANT.

I.

There is no limitation as to the quantity of land granted.

The learned counsel for the government in their brief appear to attach great importance to a part of the original petition of Jose de Leyba, made in 1728, which they claim must limit the grant to a little over four acres. The language referred to, in the Spanish, is as follows:—

> registro un pedaso de tierras y monte, yermo y despoblado, que cabe media fanega de mais de sembradura, poco mas ó menos.

Neither the translation in the record (p. 112) nor the one set out in the brief for the government (p. 5) is correct, as we will here show to the court. That we have not heretofore given attention to this point, is because we had not considered it of any consequence. Correctly translated, the language quoted is as follows:

> I record a piece of lands and woods uncultivated and unsettled which includes a half a fanega of corn-planting land, a little more or less.

The government translation is

> I register a piece of lands and woods uncultivated and unsettled that will contain half a fanega de *maiz de sembradura*, a little more or less.

It will be noted that the essential difference is as to the meaning in English of the two words "*que cabe*," or rather of the one word "*cabe*." *Cabe* is the third person singu-

lar of the present tense in the indicative mood of the verb *caber*.

The latest and best Spanish-English dictionary, that of Velasquez de la Cadena, published in 1900, gives as the English equivalent of *Caber*, used as an active verb, "To contain, to comprise, to include."

If it is here used as an active verb, clearly the context, which refers to lands and woods, and gives boundaries of the piece of land undoubtedly far beyond any four-acre tract, requires us so to translate the word as to have it indicate merely that somewhere within the "piece of lands and woods" asked for there is to be found "a half a fanega of corn-planting land, more or less."

Reference to standard Spanish dictionaries will corroborate this view, and makes it even stronger. The Diccionario de la Academia Española, of 1899, defines the word "Poder contenerse una cosa dentro de otra. *Contineri*"; or, in as literal English as possible, "To be able to be contained one thing within another," or "inside of another."

The same definition is to be found in different editions of the dictionary of the Academy, in the Diccionario Enciclopedico of 1900, and presumably in any other standard Spanish dictionary.

The assumption that this word indicates any intention on the part of Leyba to ask for only a half a fanega of land, is utterly without any foundation whatever.

Moreover, the will of Simon de Leyba in 1783, and the deed of Salvador Antonio to Juan Angel Leyba, in 1834, show the consistent assertion for more than a century of claim under this grant to all the land within the boundaries given, and the ignoring of any limitation to a half a fanega of land.

No one ever dreamed of such alimitation until now,

when the government has been, by the will of Simon, of 1783, and the deed of 1834 to Juan Angel, forced entirely to abandon the theory of the defence made in the court below.

The will of 1783 indicates the existence at the Coyote Spring of such buildings, corrals, farming tools, &c., as to show that there was probably much more than four acres of land under cultivation at that time. This was undoubtedly the Pueblito de los Leybas mentioned in the evidence. (Record, pp. 14 and 99.)

It is asserted, however, that "Quantity was of the essence of the entire grant, else the alcalde would have named the outboundaries in the act of possession." (Brief for U. S., p. 34.) No reason is assigned for this assertion. It was not uncommon for the act of possession not to set out boundaries. In this case the alcalde gave "the possession prayed for by José de Leyba in his petition," and before doing so, "inspected the land and woods prayed for by the said petitioner." The alcalde adopted what was set out in the petition.

II.

This title was complete and perfect at the date when the United States acquired sovereignty over New Mexico.

This proposition has been sufficiently discussed in appellant's original brief, and we desire here to add only that the grounds upon which the argument rests have been increased and strengthened by the more recently-filed documentary evidence.

It is a matter of surprise that counsel for the government have the courage to declare, as they do at page 43

of their Brief, in effect, that the law of presumptions has no application to the question of confirmation under the ordinance of 1754, when we recall that in a recent case this court held two titles to be perfect solely upon the presumptions arising from possession of land from 1785 to the date when the United States acquired sovereignty.

U. S. v. *Chaves*, 175 *U. S.*, 520, 524..

"The express determination by the court below on the value and weight of the testimony presented to establish possession," (*Brief for U. S., p.* 44), has no application whatever to the record as it now stands, and it is impossible that that court would have held as it did on this point, if the case had been presented as it now is.

III.

There is no ground for the suggestion of laches.

Upon this point, probably appellant might safely stand on what is set out under the fourth head of his original brief, where it is shown that a complete legal title, once vested, cannot be lost by mere failure to occupy, whether under Spanish or English law; but, even if we go beyond this safe rule, the facts disclosed by the record do not justify the attack made by counsel for the United States under the third point of their Brief, at pages 45 to 51. Repeated references, on pages 46, 48, 50, 55, 57, are made to "the descendants of Leyba, if any there were," and to "the Leybas," as though there were many of them who ought to have been asserting their rights before the surveyor general and in the land court at an earlier day.

The record shows that there was but one Leyba in existence who owned this property at the time of the Ameri-

can occupation, and he was then four or five years old. It is also shown that he was called a *mujerote* (Record, p. 83,) of whom as much ought not to be expected as of most men. This word is a local provincialism, not to be found in dictionaries, the nearest approach to it being *mujeriego*, and is used rather as a term of reproach and derision, meaning a womanish, effeminate man, lacking in the vigorous qualities, mentally or physically, or both, which ordinarily characterize complete manhood. Moreover, he may have been long ignorant of his ownership, and when he did learn of it, had no desire, perhaps no means, to assert his claims. The act of 1854 which created the office of surveyor general, imposed no duty or requirement of any kind whatever upon grant claimants, but merely declared the duty of the surveyor general in such matters. Failure to present a claim to him, was no neglect of duty, and there was nothing in the administration of that system for settling land titles, to attract or encourage claimants to invoke the jurisdiction. Nearly all the claims confirmed by Congress were so confirmed by two acts, one in 1858 and the other in 1860. Thereafter, one was confirmed in 1861, one in 1866, seven in 1869, one in 1879, and no more. Long before 1879 it was generally known in New Mexico that there was no reason to hope for any more confirmations by Congress, and that it was a waste of time and money to go before the surveyor general with such claims.

As to the land court, that tribunal was organized in December, 1891. Within less than four years thereafter, the owner sold and conveyed to the plaintiff, who promptly gave notice of his claims to the company for whose benefit this defence appears to be conducted, by bringing suit in the district court of Santa Fé county, which was dismissed in 1899, when the present case was begun. The

reasons for that dismissal do not appear in the record, but it cannot be considered improper if we say that they were in no way discreditable to plaintiff.

IV.

There is no evidence of abandonment.

The authorities are that to justify a finding that an owner has abandoned his property, under the Spanish law, the evidence must be clear, definite, and convincing, both of the fact of non-occupancy and of the intent of the owner. This is sufficiently discussed in our original brief. There is no such evidence in the record, and yet counsel for the government assert, with apparent confidence, that "the facts disclosed by this record clearly show abandonment" about 1837 (*Brief, p.* 57). In 1834 Salvador Antonio Leyba was in possession, and conveyed to his son, Juan Angel. Juan Angel Leyba was living on the property after 1839, and was killed near it before 1846, leaving one child, who was born in 1839. It is not quite clear whether the learned counsel for the government impute the essential intent to abandon, to Juan Angel, who was suddenly killed, or to his infant son.

Possession or non-possession since 1848, as shown in our former brief, cannot properly be regarded as an element going to make up, or defeat, a claim to a perfect title.

Crespin v. *U. S.*, 168 *U. S.* 218.

V.

The boundaries are sufficiently established for purposes of confirmation.

The converse of this proposition is asserted on the other side. Counsel declare with evident sincerity that the only boundary proved "with any suggestion of certainty" is the eastern,—the San Marcos road. We are grateful for that concession. In discussing the northern boundary,—the lands of the Captain Sebastian de Vargas, as given in the grant of 1728 and the deed of 1834,—counsel ignore the will of 1783, which shows the boundary to be "the road which goes towards Pecos from the Cerrillos, or lands of the Captain Sebastian de Vargas." That road is well known, and is plainly marked on maps in the record. The suggestion is made that, because the Sebastian de Vargas grant as confirmed by the land court is not north of the tract here claimed, therefore we are precluded from urging in this case that, as a matter of fact, it is our northern boundary. We were not parties to the case of Purdy *v.* United States, and are in no way bound by the result thereof; but we call attention to the fact that the opinion in that case (*Record*, *p.* 126) shows that the original grant papers had been lost, and that the southern boundary of what was confirmed was established by proof of the grant to Lorenzo Marquez which gave the de Vargas land as its north boundary. The opinion says that no such evidence was presented as to the western portion of the claimed de Vargas grant (*Record*, *p.* 129), and the conviction is irresistible that if the court had had the documentary evidence now included in the present record, the confirmation would have extended to the

western portion. There is no shadow of doubt as to the location of our northern boundary.

The western boundary is, in the grant papers, the lands of Juan Garcia de las Rivas, but in the will of 1783 and in the deed of 1834, it is the lands of the old Pueblo of the Cienega. It is shown by documentary evidence (*Appellant's original Brief, p.* 10) that, in 1701, the lands of the old Pueblo of the Cienega were the property of Miguel Garzia de la Riba who was the father of Juan Garcia de las Rivas. But our learned adversaries declare "that there is absolutely nothing to show what is the east boundary of the sitio or tract called in 1701 the old Pueblo of La Cienega." (*Brief, p.* 60.) This is not quite correct, although it is the fact that the lands of Cienega or the old Pueblo of Cienega, are so well-known in that part of the country that their location was rather taken for granted at the time of the trial (Record, pp. 25, 28, 31, 44, 45, 52, 62), and there is not much evidence on the subject, but there is enough to show that an intelligent surveyor would have no difficulty in fixing their location. (*Record, pp.* 139, 141–2, 86, 90.) Certainly this is all that is needed in this case. Mr. Willison, engineer and surveyor, testifies that he knows where the old Pueblo de la Cienega is (*Record, p.* 86); that he had documentary evidence in regard to how far east the Cienega lands extended (*Record, p.* 88), and had seen numerous deeds of lands out there in private hands (*Record, p.* 96). The information is readily accessible for the making of a survey. The evidence here is ample for a decree giving the lands of the old Pueblo de la Cienega as the western boundary.

We now come to the southern boundary,—the cuesta (slope) called the Arroyo del Oregano. As stated in our original brief at page 5, this is not so clearly and definitely

located as are the other boundaries, but it is certain that it is between the Coyote Spring and the San Marcos Spring, which latter is about two miles south of the former. The will of Simon de Leyba, of 1783, made at the Coyote Spring, declares that the ranch at the Coyote Spring is in the grant, and the conveyance of the grant from Salvador Antonio Leyba to his son, Juan Angel Leyba, in 1834, distinctly includes the rancho of the Coyote Spring. These documents make it clear that the cuesta is south of the Coyote Spring. Without further proof, this would be sufficient to justify a decree fixing the cuesta by name as the southern boundary with the qualification that it must be south of the Coyote Spring. But the witness Willison (Record, pages 87 and 88), upon information derived from an old man, now dead, clearly locates the cuesta and Arroyo, and shows the certainty of any intelligent surveyor being able in the field to find these natural objects. Another witness, Campos, locates the cuesta differently from Willison (Record, pp. 80, 82), and counsel for the government magnify the importance of this difference. Without a topographical survey, it is impossible to say whether Willison or Campos is right, or whether both may not be. They may be referring to the same natural objects at different points in their course. Willison says the Coyote Spring is in the Arroyo del Oregano. (Record, p. 87.)

In connection with this boundary it is to be noted that counsel for the government, at pages 21–22 of their brief, attempt to make a point against us because the title papers of the San Marcos grant in 1754 contain no reference to the Leyba grant, and assert that the San Marcos grant is "claimed to be coterminous with this grant." They do not say by whom it is so claimed, but certainly the plaintiff has never made such claim. The only refer-

ence to anything approaching such a statement is in the remarks of counsel at page 104 of the Record, as to what a witness would testify, if permitted, and what is there said falls short of any claim that the grants adjoin.

VI.

Plaintiff was prejudiced by the action of the court below as to the depositions.

These depositions and the ruling thereon, are discussed at pages 13 to 15 of our original brief. No addition to what is there said seems necessary, especially as counsel for the government, at page 63 of their Brief, appear to concede its force, and attempt to meet it by declaring that "while declining to compel the government to call these witnesses for cross-examination, the court clearly notified counsel that if the witnesses were in attendance, he might call them himself for cross-examination."

We certainly did not, at the time, understand the court to give any such notice, nor can we now find such notice in the record. We believed ourselves to be placed in such a position that we could not call these persons without making them our own witnesses, which we were not willing to do, having no confidence in their honesty. We submit that the record does not bear out the assertion that the court told us we could call the witnesses for cross-examination. All that appears on this subject is to be found on pages 24–5, 36, and 134–5 of the Record, and we invite attention thereto. It is to be noted that the word "able," in the second line of page 25, should read "unable."

We again respectfully submit to the court that the appellant is entitled to a confirmation of his claim, notwithstanding what is set up on behalf of the United States.

H. S. CLANCY,
F. W. CLANCY,
Counsel for Appellant.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 40.

MARIANO F. SENA, APPELLANT,

vs.

THE UNITED STATES.

Petition for Modification of Judgment and for Rehearing.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the appellant in the above entitled cause, respectfully calls the attention of the court to the fact that the judgment of affirmance, as entered in said cause, does not exactly express what the opinion of the court clearly intends, and, unless amended, may seriously prejudice the rights of your petitioner.

Your petitioner shows that the said judgment affirms the decree of the court of private land claims without qualification or restriction; that the decree thus affirmed, which appears at pages 239-40 of the printed Record, contains a finding that the title asserted by your petitioner to the land alleged to have been granted to Jose de Leyba on the 25th day of May, 1728, "is of no validity," but this court, in its opinion, is so far from adopting this finding of the court below, that it declines to express "an opinion as to whether this was a perfect or imperfect grant within the meaning of the law," and affirms the judgment upon another ground.

Your petitioner further shows that he is advised that, notwithstanding what is said in the opinion of this court, it may be held elsewhere, and will undoubtedly be contended, that the judgment of affirmance in its present shape, is an affirmance of the finding that the title alleged is of no validity.

Your petitioner further shows that this application has not been sooner made only because neither he nor either of his counsel was advised of the form in which said judgment of affirmance had been entered until late in the afternoon of Saturday, May 23, 1903, when the counsel who prepares this petition was informed, at Albuquerque, New Mexico, by telegram from Washington, that the judgment simply affirms the judgment of the court below without qualification, although he had, as early as April 24, 1903, by letter, which must have gone astray, attempted to get information on this point.

Your petitioner, therefore, prays that the judgment of this court be so amended as to declare that, in accordance with the opinion of this court and for the reason therein set forth, the judgment or decree of the court of private land claims is affirmed so far as it decreed that the petition be dismissed; and that the mandate heretofore issued from this court be recalled and made to conform to the amended judgment.

Your petitioner prays also that a rehearing be ordered in this cause, for the reason that the court, in its opinion, holds that the right, under the act of Congress creating the court of private land claims, to prosecute a claim to land based upon a perfect Spanish title, may be lost by laches, which holding violates the well-established rule of both the civil and the common law, that a complete legal title can never be divested by the owner's failure to assert his rights, and ignores the consideration that there is no one who can have any standing or right to complain of the laches, because the government cannot have suffered any loss thereby, and because Congress has, by section 14 of said act, provided for the protection of any individual who might otherwise suffer from such laches, it being improper for the judiciary to add to the legislation of Congress on this subject.

F. W. CLANCY,
Of Counsel for Appellant.